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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERALD DRASEN, ANTHONY ALEO and CYNTHIA ALEO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether unassembled and never-before assembled constituent parts of a rifle, which might or might not be assembled to form a short-barrel rifle, are a short-barrel rifle within the meaning of the National Firearms Act, 26 U.S.C. Section 5845?

2. Whether the Court of Appeals' Opinion represents a substantial erosion of the Due Process right to fair notice in criminal statutes because it construed an admittedly ambiguous criminal statute in favor of the government?

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In The

Supreme Court of the United States

October Term, 1988

GERALD DRASEN, ANTHONY ALEO and CYNTHIA ALEO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Gerald T. Drasen, Anthony Aleo and Cynthia Aleo, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 29, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 845 F.2d 731 (7th Cir. 1988) and is reprinted as Appendix A to this Petition at 1.

The opinion and order of the United States District Court for the Northern District of Illinois is reported at

665 F.Supp. 598 (N.D. 1987) and is reprinted, along with the district court's memorandum opinion in response to the government's motion to reconsider, as Appendix C at 21.

JURISDICTION

The jurisdiction of the district court was predicated upon an indictment charging violation of 26 U.S.C., Sections 5801, 5802, 5861(a) and 5845.

The government requested an interim appeal from the district court's dismissal of six counts of the fourteen-count indictment pursuant to 18 U.S.C. Section 3731.

On April 29, 1988, the Seventh Circuit reversed the district court and remanded the matter to the trial judge. A petition for rehearing was timely filed on behalf of the petitioners.

The petition for rehearing was denied on July 5, 1988.

This petition for certiorari is being filed within 60 days from the denial of the petition for rehearing on July 5, 1988, pursuant to Supreme Court Rule 20.4.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution Of The United States,
Amendment V, (Due Process Clause)

No person shall . . . be deprived of the liberty, or property, without due process of law . . .

STATUTE INVOLVED

26 U.S.C. Section 5845(c)

Rifle:

A weapon designed or redesigned, made or remade, and intended to be fired from the shoulder, and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include, any such weapon which may be readily restored to fire a fixed cartridge.

STATEMENT OF THE CASE

Petitioners, GERALD T. DRASEN ("Drasen"), ANTHONY ALEO and CYNTHIA ALEO (the "Aleos") were charged with dealing in and transferring firearms in violation of 26 U.S.C. Section 5861. Count One of the Indictment alleged that Drasen unlawfully engaged in business as a dealer in "rifles having a barrel of less than 16 inches," in violation of 26 U.S.C. Section 5861(a) (1982), aided and abetted by the Aleos, in violation of 18 U.S.C. Section 2 (1982). Counts III through VII alleged that the Aleos unlawfully transferred five different rifles, having barrels of less than 16 inches in length, in violation of 26 U.S.C. Section 5861(e) (1982), aided and abetted by Drasen, in violation of 18 U.S.C. Section 2. Petitioners filed a Motion to Dismiss on the ground that the Indictment taken together with a Bill of Particulars, in which the government acknowledged that all of the short-barrel rifles referred to in the Indictment were unassembled when sold by the petitioners, failed to charge an offense. Petitioners

contended that a collection of component parts which have never been assembled into a weapon cannot fall within the definition of a "rifle," "short-barrel rifle," or "firearm" under the statute, 26 U.S.C. Section 5845.

In a memorandum opinion and order, dated January 15, 1987, the district court dismissed Count I and Counts III through VII of the indictment. (App. at 36) In its original opinion, the district court focused on the specific language of the statutory definition of "rifle." Noting the "readily restored to fire" language and the lack of any "combination of parts" language in the statutory definition, the district court concluded that the statute's application was limited to previously assembled weapons. (App. at 45)

On February 4, 1987, the government filed a motion to reconsider contending, in part, that the constituent parts of a weapon should be considered tantamount to a completed "rifle" without reference to the "readily restored to fire" language of Section 5845(c) and that the district court's "fair notice" analysis overlooked the fact that the indictment charged the petitioners with a "strict liability offense" which placed the burden on them to ascertain the legality of their conduct.

In its opinion denying the motion to reconsider, the district court concluded that the statute's use of the words "weapon" and "made" indicated that its coverage was likely confined to assembled weapons and that, although defendants did have the burden of determining whether their conduct was lawful, the statute and other authorities were not sufficiently clear "so that a person *could* determine that the conduct currently under prosecution is illegal." (App. at 30)

On appeal, a panel of the Seventh Circuit Court of Appeals reversed (2-1) the district court holding that rifle kits that had never been assembled were within the defini-

tion of "rifle" under the Act. (App. at 12) In dismissing the defendants' "fair notice" argument, the court stated that a "common sense reading of the statute," in addition to the "highly regulated business" petitioners were involved in, should have "made them inquire into the applicable firearms regulations." (App. at 13)

However, as Judge Manion noted in his dissent, even if petitioners had inquired into the legality of selling parts kits, the statute could not have fairly informed them that selling parts kits was illegal. (App. at 15) Based on Judge Manion's dissent, petitioners filed a petition for rehearing. The petition stressed three fundamental concepts:

1) The Court of Appeals' decision violates all established rules of statutory construction;
2) The Court of Appeals' decision violates the settled rule of law that ambiguities in criminal statutes must be resolved in favor of the defendant;
3) The Court of Appeals' decision violates the due process guarantee that a criminal statute must clearly specify what conduct is illegal.

The Court of Appeals denied the petition for rehearing without analysis. (App. at 19)

REASONS FOR GRANTING CERTIORARI

I. SUMMARY OF REASONS FOR GRANTING CERTIORARI.

This case involves the statutory definition of "rifle" under 26 U.S.C. Section 5861. The district court dismissed

six Counts[1] of the Indictment against the defendants on the ground that a combination of parts which might be, but never has been, assembled to be a rifle was not within the statutory definition of "rifle" for purposes of Sec. 26 U.S.C. Sec. 5861 as defined in 26 U.S.C. Sec. 5845(c). Prior to the decision of the district court, no court had construed whether the sale of an unassembled "parts kit" which might (or might not) be assembled to form a "rifle" was a "rifle" under the statutory definition. In its Opinion, the Court of Appeals became the first to decide that an unassembled collection of parts was a "rifle" under Section 5861.

This case is significant for several reasons, each of which independently merits review by this Court. First, it is a case of first impression construing the National Firearms Act ("NFA") to reach parts collections which might be assembled as a rifle. As a result, the decision of the Court of Appeals brings within the ambit of the National Firearms Act a panoply of individuals and businesses whose activities were previously beyond its reach.[2]

Second, the decision of the Court of Appeals is in direct conflict with decisions of this Court and other Courts of Appeals cited *infra*, regarding every principle of statutory interpretation pertinent to this issue. By judicially amending the statute to add a "combination of parts clause,"

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[1] These Counts charged that defendants transferred "rifles" without registration and engaged in the sale of "rifles" without a license.

[2] The importance of this case is underscored by the fact that U.S. Senators Hatch and McClure and Representative Craig thought it so significant that they sought and were granted leave to file an *amicus curiae* brief arguing that Congress did not intend this statute to be read as the Court of Appeals read it.

the Court of Appeals refused to implement the rules of statutory construction which mandate that:

a. The use of different language in parallel provisions of the same statutory scheme shows Congressional intent that the provisions be given different meanings;

b. Where Congress adds words to a statute, it does so for a purpose;

c. Ambiguous criminal statues must be construed against the government;

d. Fifth Amendment Due Process requires that criminal statutes give fair notice as to what conduct is illegal;

e. Revenue Rulings do not have the force of law, either independently or under the "legislative reenactment" doctrine.

In every respect, the decision of the Court of Appeals represents unfortunate judicial activism by *de facto* amendment of a criminal statute where strict construction should be the rule.

Third, the decision of the Court of Appeals represents a substantial erosion of the right to Due Process, which mandates fair notice in criminal statutes, by construing an admittedly ambiguous criminal statute in favor of the government. In so holding, the Court of Appeals erroneously created a "firearms exception" to the constitutional guaranty of due process, for which there is no support in precedent or logic. The decision of the Court of Appeals creates a springboard for expansion of the rule that ambiguous criminal statutes must be construed in favor of the prosecution into any area of the law which might be deemed by the government to be "highly regulated."

II. THE DECISION OF THE COURT OF APPEALS RESTS UPON RULES OF STATUTORY CONSTRUCTION WHICH ARE IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

The Court of Appeals held that the definition of "rifle" in 26 U.S.C. 5845(c) includes any combination of parts which could be assembled to form a rifle. In so holding, that Court violated every pertinent rule of statutory construction and rendered a sweeping decision with respect to federal criminal law which is palpably in error. Certiorari should be granted to review that decision and to hold that Section 5845(c), taken in context of the entire statute, was never intended by Congress to apply to a combination of parts which might or might not be assembled to form a "rifle."

As this Court has held on numerous occasions, "the starting point for interpreting a statute is the language of the statute itself and, absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051 (1980).

Section 5845(a)(3) defines "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length."[3] "Rifle" is defined as:

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[3] Rifles with barrels over 16 inches in length are not subject to the same special tax and registration requirements of Section 5861 because they are not "firearms" as defined by the Act. This distinction is particularly important to the case at bar. Petitioners contend that Congress never intended to insert a combination of parts clause in the rifle definition because a combination of parts

(Footnote continued on following page)

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. Section 5845(c) 1982.

It is abundantly clear that the words of this statutory definition, given their commonly understood meanings, do not expressly include a "combination of parts from which a rifle could be assembled" within the definition of "rifle."

The Court of Appeals concluded, however, that the petitioners, using a "common sense" approach, should have inferred that Congress intended the statutory definition to include a "combination of parts" even though Congress did not expressly say so. In reaching that conclusion, the decision of the Court of Appeals is in conflict with each of the applicable tenets of statutory construction established by settled law.

The canons of statutory construction are clear: statutes are to be construed as a whole;[4] Congress does not in-

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[3] *continued*
which form a rifle with a barrel length over 16 inches is not a "firearm" under the Act. The same does not hold true for "parts" which make up a machinegun, silencer or destructive device. No matter how the "maker" assembles the parts of a machinegun, silencer or destructive device, the end result is still a regulated "firearm."

[4] *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769 (1984).

sert words in a statute for no reason;[5] and when Congress uses disparate wording in separate provisions of the same statute, it intends those provisions to have different meanings.[6] In order to adopt the reading urged by the government, the Court of Appeals abandoned each of these principles.

The parallel provisions of other sections of the NFA demonstrate without question that where Congress intended to legislate with respect to a "combination of parts" it did so by using those exact words—conspicuous by their absence in the statutory definition of "rifle."

For example, Congress has specifically provided that a "machinegun," another variety of NFA "firearm," includes not only a "weapon" which shoots automatically, but also ". . . any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. Sec. 5845(b) (emphasis added). In addition, where Congress intended to capture within the definition of "machinegun" a combination of parts which could be used to convert

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[5] *Bird v. United States*, 187 U.S. 118, 124, 23 S.Ct. 42 (1902); *Uptagrafft v. United States*, 315 F.2d 200, 204 (4th Cir. 1963), *cert. denied*, 375 U.S. 818, 84 S.Ct. 54 (1963); *United States v. Blasius*, 397 F.2d 203, 207 (2d Cir. 1968), *cert. dismissed*, 393 U.S. 1008, 89 S.Ct. 615 (1969).

[6] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296 (1983), quoting with approval from, *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972), and citing, *United States v. Wooten*, 688 F.2d 941, 950 (4th Cir. 1982). *See also, Lankford v. Law Enforcement Assistance Administration*, 670 F.2d 35, 36 (4th Cir. 1980), and *Tafoya v. U.S. Department of Justice*, 748 F.2d 1389, 1391-1392 (10th Cir. 1984).

a weapon which was not previously a machinegun into a machinegun, it had no difficulty drafting such a provision: "The term [machinegun] shall also include . . . *any combination of parts designed or intended for use in converting a weapon into a machinegun* . . . ." 26 U.S.C. Sec. 5845(b) (emphasis added).

In similar fashion, Congress defined "a muffler or silencer for any firearm as including ". . . any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler* and any part intended only for use in such assembly of fabrication." 18 U.S.C. Sec. 921(a)(24) (emphasis added).

Likewise, Congress had no difficulty expressing its intent that a combination of parts which could be used to convert a device into a "destructive device," yet another category of NFA "firearm," or a combination of parts from which such a "destructive device" could be assembled, were firearms. Under 26 U.S.C. Sec. 5845(f), a "destructive device" includes:

> (3) *any combination of parts* either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) *and from which a destructive device may be readily assembled."*[7] (Emphasis added.)

[7] It is also apparent that Congress has no difficulty using the term "assembled" when it wants to capture within its definition a group of parts which may or may not have previously been assembled to form an operative weapon. That fact further undermines the Government's contention that "readily restored" in 26 U.S.C. Sec. 5845(c) actually means "readily assembled."

Had Congress intended that the term "firearm" in the NFA encompass a combination of parts, there would have been no need for Congress to specify that a combination of parts for some types of firearms fell within the same definition as the completed item.

After citing an obscure 1954 Revenue Ruling[8] which was neither adopted nor mentioned in the congressional hearings leading up to the 1968 NFA Amendments, and after admitting that the statute "could easily be clearer" (App. at 13), the Court of Appeals contravened all of this Court's well-settled rules of statutory construction by holding that a "common sense" interpretation of Section 5845, coupled with a duty imposed on petitioners to inquire into the legality of their actions, would have revealed that selling parts kits was illegal.

In so doing, the Court of Appeals ignored the fundamental precept that Congress does not insert words in a statute for no reason. *Bird v. United States*, 187 U.S. 118, 124, 23 S.Ct. 42 (1902); *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585 (1962).[9] The statutory definition of rifle does not include a "combination of parts" clause.

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[8] Revenue Ruling 54-606, 1954-2 C.B. 33 provides:

> Where an individual, partnership, company, association, or corporation has possession or control of sufficient parts to assemble an operative firearm as defined in Sec. 5848(1) of the Internal Revenue Code of 1954, the possession or control thereof constitutes the possession of a firearm. Further, the transfer, as defined in Sec. 5848(10) of such Code, of sufficient parts to assemble an operative firearm is deemed to constitute the transfer of a firearm subject to the tax imposed under Sec. 5811(a) of the Code.

[9] "It must be assumed that legislative purpose is expressed by ordinary meaning of words used in the statute, and where they have a basic and usual sense, they require no resort to legislative history." *Richards, supra* at 369 U.S. 9.

The statutory definitions of "machinegun," "machinegun conversion kit," "muffler" or "silencer" and "destructive device," all in the same statutory scheme, all contain a specific clause which includes "any combination of parts" from which the item could be assembled. The statutory definition of "rifle" does not contain that language.

Judge Manion, in dissent, observed that even if the petitioners had inquired, the statute could not have informed them that their conduct was illegal. Making reference to the lack of a combination of parts clause in the rifle definition, Judge Manion concluded that:

> . . . where Congress intended to regulate combinations of parts, it did so precisely and explicitly. For example, the definition of "machinegun," Sec. 5845(b), includes "combination of parts" language . . . the "combination of parts" language does not simply refer to "any" part. The definition of "machinegun" also includes 'any part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun . . .' If the "combination of parts" language was sufficient to regulate "any" part, the "any part" language would have been unnecessary. The definition of "machinegun" shows that when Congress wanted to regulate a "combination of parts," or "any" parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle. (App. at 15)

If, as the Court of Appeals asserts, it is "common sense" that a "combination of parts" which can be assembled to form a weapon *is* the weapon, there was no need for Congress to insert the words "any combination of parts" in the statutory definition of machinegun, machinegun conversion kit, silencer or destructive device. The Court of Appeals' opinion thus rests on a second erroneous premise that Congress inserted the words "combination of parts"

into the definitions of three subsections of the same statute for no reason.

In addition, when the statutory definitions of "machinegun," "silencer" and "destructive device" are laid beside the statutory definition of "rifle," it is clear that Congress used different wording in the definition of "rifle." Of these, only "rifle" does not contain a clause encompassing a "combination of parts." By giving the statute the interpretation that a "combination of parts" is included in the definition of rifle, the Court of Appeals contravenes the basic principle of statutory construction that where parallel statutory provisions are worded differently, that difference in wording requires a difference in result. The Court of Appeals construed clearly disparate statutory provisions to mean exactly the same thing. In doing so, the Court of Appeals renders a decision which is in direct conflict with the settled law in other circuits as well as decisions of this Court.

Even more untenable is the Court of Appeals' reliance on an obscure 1954 Revenue Ruling which it claims was part of the "existing administrative interpretation" in effect prior to the 1968 Amendments to the National Firearms Act and now has the force and effect of law. Citing, *United States v. Board of Commissioners*, 435 U.S. 110, 134, 98 S.Ct. 965 (1978) which held that when Congress, in re-enacting a statute, voices its approval of an administrative or other interpretation, that interpretation is treated as if Congress expressly adopted it, the Court of Appeals, without making reference to a single congressional hearing in which Rev.Rule 54-606 was considered prior to the Congress' enactment of the 1968 Amendments, simply concluded that "the interpretation continues to be binding on the courts." (App. at 11)

The decisions are clear that, whereas a properly enacted Regulation has the force and effect of law, a ruling of the IRS is merely an advisory guide, not to be accorded the force and effect of law. *See, Flanagan v. United States*, 810 F.2d 930 (10th Cir. 1987); *Brook, Inc. v. Commissioner of Revenue*, 799 F.2d 833 (2d Cir. 1986). While the this Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code, that authority must conform to Congressional intent. *Bob Jones University v. United States*, 461 U.S. 574, 596-97, 103 S.Ct. 2017 (1983).

This Court and various Courts of Appeal have held that Revenue Rulings, unlike Regulations, are not proper subject matter for application of the "legislative reenactment" rule when such Rulings have not been brought to the intention of Congress during congressional deliberations regarding reenactment of a statute. *Helvering v. New York Trust Co.*, 292 U.S. 455, 467-68, 54 S.Ct. 806 (1934).[10] There is no indication here that Congress ever considered Rev.Rul. 54-606 nor is there even an indication that Congress understood the administrative construction it said it was adopting.

By judicially amending Section 5845(c) to include never-before assembled parts kits, the Court of Appeals engaged

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[10] Also, in *Kaiser v. United States*, 262 F.2d 367 (7th Cir. 1958), *aff'd*, 363 U.S. 299, 80 S.Ct. 1204 (1960), the Court of Appeals specifically rejected application of the legislative reenactments rule to a 1920 Revenue Ruling which preceded several reenactments of the Internal Revenue Code, holding:

> [T]he so-called reenactment doctrine is more properly applied to regulations, which have the force of law, then to rulings. It has been said the rules have "no more binding or legal force than the opinion of any other lawyer." 262 F.2d at 370 (footnotes omitted).

in a form of judicial activism unparalleled in the history of statutory construction.

What offends the principles of statutory construction and fundamental fairness here is that the statute, taken as a whole, makes no reference to "parts" or "combination of parts" in the definition of "rifle," although it clearly makes such reference in the definitions of other types of firearms. To hold petitioners criminally liable for conduct they could not have determined was illegal, even after thorough analysis of the statute and its legislative history, is unjust. As Judge Manion points out, "we should not impose criminal liability based on imprecise statutory language, or an old and obscure revenue ruling that Congress did not even mention in the legislative history . . . people should not have to speculate on how Congress (or a court) applies 'common sense' when determining whether conduct is illegal." (App. at 16)

For these reasons, this Court ought grant Certiorari to review and reverse the decision of the Court of Appeals.

III. THE COURT OF APPEALS' OPINION REPRESENTS A SUBSTANTIAL EROSION OF THE DUE PROCESS RIGHT TO FAIR NOTICE IN CRIMINAL STATUTES BECAUSE IT CONSTRUED AN ADMITTEDLY AMBIGUOUS CRIMINAL STATUTE IN FAVOR OF THE GOVERNMENT.

This Court should grant certiorari to redress a clear violation of petitioners' constitutional rights of due process and fundamental fairness.

The Court of Appeals, while repeatedly admitting that this statute is unclear,[11] held that a "common sense" ap-

[11] The Opinion is littered with language which indicates the lack of clarity and ambiguity of the statute:

(Footnote continued on following page)

proach in reading Sec. 5845 would have informed petitioners that selling rifle parts kits was illegal. The Court refused to entertain petitioners' arguments concerning fair notice and the harm caused by ambiguous criminal statutes relying instead on the government's argument that since petitioners were dealing in a regulated industry, they had a burden to ascertain whether their activities were within the statute. The illogic in such a conclusion is that, even if the petitioners had inquired, the statute is so ambiguous that men of ordinary intelligence could never interpret its parameters. Nevertheless, the practical result of the Court's decision will be that in any prosecution brought under the National Firearms Act where an ambiguous statute is at issue, the statute will be construed in favor of the government, and any doubts regarding statutory construction will be resolved against the defendants. Such a result is intolerable.

It is fundamental to our notion of Fifth Amendment Due Process that a criminal statute must clearly define what

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[11] *continued*

A. ". . . the government's statutory interpretation has some difficulty in accommodating the 'readily restored' language." (A-4)

B. "Applying the facts of this case, the statute on its face is not clear." (A-4)

C. ". . . it is apparent that to clarify the statute, little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon." (A-4)

D. "The statutory language 'readily restored' is somewhat ambiguous." (A-5)

E. ". . . it is clear that the statute's intended meaning is not as readily discernible as could be desired." (A-5)

F. "The statute could easily be clearer . . ." (A-13)

constitutes an offense. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855 (1983). "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972). A criminal statute may not be so vague that men of ordinary intelligence must necessarily guess at its meaning. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908 (1973); *Colten v. Kentucky*, 407 U.S. 104, 110-11, 92 S.Ct. 1953 (1972); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808 (1954). Although the "void-for-vagueness" doctrine focuses on both actual notice to citizens and arbitrary enforcement, this Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242 (1974).

Coupled with this Court's "void-for-vagueness" doctrine is the settled rule of law that ambiguities in criminal statutes must be resolved in favor of the defendant. *United States v. Emmons*, 410 U.S. 396, 411, 93 S.Ct. 1007 (1973); *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515 (1971); *United States v. Anzalone*, 766 F.2d 676, 680 (1st Cir. 1985). Ironically, it was in *United States v. Bass*, a firearms case, where this Court gave one of its most articulate expressions of this concept. The court in *Bass* said:

> First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). See also, *Ladner v. United States*, 358 U.S.

169, 177, 79 S.Ct. 209, 213, 3 L.Ed.2d 199 (1958); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *United States v. Five Gambling Devices, etc.*, 346 U.S. 441, 74 S.Ct. 190, 98 L.Ed. 179 (1953) (plurality opinion for affirmance). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931) (Holmes, J.). *See, also, United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). *Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.* Here, we conclude that Congress has not "plainly and unmistakably," *United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 411, 61 L.Ed. 857 (1917), made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce. 404 U.S. at 522-523 (Emphasis added; footnotes omitted).

This Court has held that Congress must speak clearly in outlawing specific conduct. As the court said in *United States v. Anzalone*, 767 F.2d 676, 682 (1st Cir. 1985):

> Although this Court, like all other institutions of the United States, is supportive of the law enforcement goals of the government and society, we cannot engage in unprincipled interpretation of the laws, lest we foment lawlessness instead of compliance. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).
>
> This is particularly so when the confusion and uncertainty in this law has been caused by the government itself, and when the solution to that situation, namely eliminating any perceived loopholes, lies completely within the government's control.

That analysis is diametrically opposite the approach employed by the Court of Appeals in concluding that the petitioners, using their "common sense," should have concluded that Congress never intended a "loophole" of the type created by a plain reading of the statute.

By requiring the petitioners to speculate at their peril as to the meaning of an unclear statute, and by telling them after the fact that their common sense should have dictated that the congressional omission of a "combination of parts" clause from the statutory definition of rifle was inadvertent, the Court of Appeals has violated all known essentials of Due Process.

This case has now been considered by a total of four federal judges—one district court judge and three judges of the Court of Appeals. The vote is now tied at two each for the competing interpretations of the statute urged by the petitioners and by the prosecution. That simple fact demonstrates that the statute is not only plainly vague and ambiguous, but also that the petitioners and all other citizens are required to speculate at their peril as to its meaning.

CONCLUSION

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1964

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

GERALD DRASEN, ANTHONY ALEO,
and CYNTHIA ALEO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 500—**Susan Getzendanner, *Judge.***

ARGUED NOVEMBER 30, 1987—DECIDED APRIL 29, 1988

Before CUMMINGS, WOOD, JR., and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* This is an interim appeal[1] by the government from the dismissal of six counts of a fourteen-count indictment. The first count charged the defendant Gerald Drasen, aided and abetted by defendants Anthony Aleo and Cynthia Aleo, with engaging in business as a dealer in rifles having barrels of less than sixteen

[1] Jurisdiction rests on 18 U.S.C. § 3731 (1982), which permits a government appeal from a district court decision dismissing one or more counts of an indictment.

inches in length without having paid the special occupational tax required by 26 U.S.C. § 5801, and without having registered with the Secretary of the Treasury as a dealer as required by 26 U.S.C. § 5802, in violation of 26 U.S.C. § 5861(a).[2] Counts three through seven charged defendants Anthony Aleo and Cynthia Aleo, aided and abetted by defendant Gerald Drasen, with transferring five different firearms, all having barrels of less than sixteen inches, in violation of 26 U.S.C. § 5845.

I. THE ISSUE

The defendants in this case were not dealing in assembled rifles, but were selling complete rifle parts kits. The government conceded during discovery that all of the short-barrel rifles involved were unassembled when the defendants sold and transferred them. The indictment was predicated upon the government's theory that the simultaneous transfer of the unassembled constituent parts of a short-barrel rifle constituted the transfer of a "rifle" within the meaning of 26 U.S.C. § 5845, in violation of 26 U.S.C. § 5861(e).[3] The defendants moved to dismiss

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[2] 26 U.S.C. § 5861(a) makes it illegal for persons to deal in firearms without paying the special occupational tax required by 26 U.S.C. § 5801 or registering the firearms as required by 26 U.S.C. § 5802.

The counts remaining and not involved in this appeal relate to transfer of a machine gun conversion kit, possession of various machine gun receivers, and the possession of a machine gun receiver not identified by serial numbers. A superseding indictment was returned and is also not involved in this appeal. The superseding indictment does not affect our review of the original indictment. It is well established that two indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment. The government may then select the indictment under which to proceed at trial. *See United States v. Stricklin*, 591 F.2d 1112, 1115-16 n.1 (5th Cir.) (collecting cases), *cert. denied*, 444 U.S. 963 (1979); 9 Federal Procedure § 22:463 (L. Ed. 1982).

[3] 26 U.S.C. § 5861(e) provides that it is unlawful to transfer a firearm in violation of the Act.

six counts on the basis that the statute did not cover unassembled rifles that had never been assembled. The district judge so held and dismissed these counts. The question, therefore, is whether or not the unassembled and never previously assembled constituent parts of a rifle, which might or might not be assembled to form a short-barrel rifle, are in fact a short-barrel rifle within the meaning of the National Firearms Act, 26 U.S.C. § 5845 (1982) (the Act). The government claims that assembled and unassembled rifles are the same under the statute, but the defendants argue that the statute excludes parts of previously unassembled rifles.[4] The issue distilled from this situation is easier to state than to decide: we must determine the meaning of the statutory term "rifle" under the National Firearms Act. The place to begin and end is with the statute and its legislative history.

II. OVERVIEW

Section 5845(a)(3) defines "firearm" to include "a rifle having a barrel . . . of less than 16 inches in length." "Rifle" is defined in section 5845 as follows:

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. § 5845(c) (1982).

The government reads that provision to include a complete rifle parts set, which it claims is the functional equivalent of an assembled firearm. The government argues

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[4] We note the filing of an amicus curiae brief in support of the defendants' position by Larry E. Craig, a member of Congress, joined in by Senators Orrin E. Hatch and James A. McClure.

that it is "only natural that Congress would have wanted to regulate all devices 'designed . . . made . . . and intended' to operate as short barrel rifles, and a parts set surely meets that definition." According to the government, a 1954 ruling by the Commissioner of Internal Revenue issued before Congress added the "readily restored to fire" language to the statute supports the government's view. The government argues that in the 1968 amendment to the Act, Congress stated its intention to endorse that administrative construction. Even though the government's statutory interpretation has some difficulty in accommodating the "readily restored" language, the government contends that, contrary to the district court's view, the statute nevertheless provided fair notice to the regulated firearms industry as to what is or is not unlawful. The government also argues that the defendants could have inquired to determine whether they were acting within the law.

The defendants' response is simply that a previously unassembled collection of rifle parts sold as a kit, although ready for assembly into a functioning rifle, does not violate the Act provisions requiring licensing and registration of certain rifles. The defendants find unsupportable the government's theories that the complete collection of parts in a kit is the functional equivalent of an assembled weapon and that the Act reaches a previously unassembled weapon that can be readily assembled. Furthermore, the defendants argue that we should construe an ambiguous criminal statute in favor of the defendants.

Applying the facts of this case, the statute on its face is not clear. Each of the parties therefore has some difficulty supporting their respective positions. Considering the statutory definition of "rifle" set out in section 5845(c), it is apparent that to clarify the statute little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon. The omission of some clarifying language does

not mean, however, that a reasonable interpretation of the statute does not yield the same result.

III. ANALYSIS

The rifle kits at issue are not a sackful of miscellaneous parts that an ordinary person could not easily sort out and assemble into a functioning rifle. The parts kits here are composed of major rifle sections already assembled, leaving only a few of the assembled sections to be quickly and easily slipped into position so as to be ready to fire. The government would have a more difficult task in claiming that a collection of totally separate parts, all unassembled and mixed, was the equivalent of a functional rifle. If the rifle parts kit is largely assembled, but not quite, the government may have an easier task. There are other complicating possibilities. A parts kit might not be totally complete, unlike the kits at issue. One part could be omitted. The rifles, therefore, would not function, but that one part might be available at a shop next door.

The statutory language "readily restored" is somewhat ambiguous. That language suggests, as the defendants argue, that if the rifle had previously been assembled, although now in a parts kit, it would be within the statute. The statute, therefore, would not cover rifle parts never before assembled into a functioning rifle. If, then, the seller demonstrated for a purchaser how easily a rifle could be assembled from a previously unassembled kit, and then disassembled the rifle and put it back in the kit for sale, all are in agreement, it appears, that the statute would cover that particular kit. There are other hypothetical possibilities, but it is clear that the statute's intended meaning is not as readily discernible as could be desired.

The term "make," used in section 5845(c), is defined in section 5845(i):

> The term "make," and the various derivatives of such word, shall include manufacturing (other than

> by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

26 U.S.C. § 5845(i) (1982). This definition suggests that, to produce a firearm, "putting together" the parts is necessary. Thus, if the parts have never been put together, the defendants argue that no firearm has in fact been made. According to the government's interpretation, however, what is "made" need not be a weapon ready to fire at that moment; the parts merely need be "capable of being made into" a weapon. The defendants argue that manufacturing parts is only one step in the production of a weapon. Even after the rifle parts have been manufactured, the rifle is not complete until the parts are assembled so that the rifle is ready to be fired. The defendants analogize that a car is not a car until it rolls off the assembly line ready to drive away.

The government suggests that the district court's and the defendants' statutory interpretation would allow criminals to legally possess short-barrel rifles in a disassembled state even though it might take very little assembly to make a functional rifle. The defendants' response is that the district court confined its ruling to rifle kits that had never, even temporarily, been assembled into functioning rifles. If the buyer of the kits does the assembling, then the buyer, not the dealer or manufacturer, would be the one required to register the rifle and pay the applicable tax. If that particular rifle were then disassembled, although capable of being readily restored to firing condition, the statute would still apply. The defendants' explanation is not the way Congress intended the statute to work.

A parts kit cannot fire a fixed cartridge, nor can the unused parts be readily "restored" to fire a fixed cartridge if "restored," as the defendants argue, means to return to a previous condition. In the defendants' view, assembling a previously unassembled parts kit would not be a restoration, but the original creation of a rifle. This would allow rifle dealers and manufacturers to use parts

kits to take advantage of a possible statutory loophole. That supposed loophole, however, would be difficult to ascribe to any conscious and reasonable legislative purpose. If the so-called loophole was intentional, then Congress's reasoning escapes us. We shall consider and weigh the opposing arguments.

The government points out that the statute contains no specific requirement that a "rifle" must be assembled and functional for the statute to apply. The defendants argue that the statutory use of the words "weapon" and "made" imply that a parts kit, which is not functional, cannot be considered a "weapon." The government responds that when the parts have been manufactured and placed in kits the rifle is as "made" as a completed rifle. A parts kit qualifies as a weapon under the statute because it has been "designed," "made," and is "intended" for use as a weapon. To bolster its argument, the government contends that any doubt about a parts kit being a weapon is eliminated by the last clause of section 5845(c), which includes rifles that can be "readily restored" to operability, drawing a difference from the use of that language than do the defendants.

The government further argues that the present statutory definition of "rifle" has its origin in the National Firearms Act of 1954, which was substantially the same as the present statute except that the "readily restored" language of the current law was not included.[5] The 1954 legislative history is of no help to either party, but the

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[5] The 1954 statute provided:

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

1954 I.R.C. § 5848(3) (as amended by Pub. L. No. 85-859, tit. II, § 203(f), 72 Stat. 1427 (1958)).

government relies upon a formal ruling of the Commissioner of Internal Revenue issued in conjunction with the 1954 Act. The ruling provided:

> The possession or control of sufficient parts to assemble an operative firearm constitutes the possession of a firearm, and the transfer of sufficient parts to assemble an operative firearm constitutes the transfer of a firearm subject to the transfer tax.

Rev. Rul. 54-606, 1954-2 C.B. 33. That ruling, the government argues, did not receive the deference from the district court to which it was entitled. *See National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 488 (1979). Therefore, the government asserts that we should accept that ruling and not interpret the ruling restrictively.

The district court, however, had some reservations about the ruling's applicability since the ruling did not mention the previously assembled or readily restored possibilities now in the statute. The Commissioner's ruling, however, was broad and all-encompassing. It plainly states that the statute applies if a person possesses or transfers sufficient parts to assemble an operating firearm. That ruling did not amend the statute, but was in keeping with the common sense interpretation of the statute. The ruling was unaffected when Congress later added the "readily restored" language to the statute. Whether the parts are to be assembled or reassembled is of no practical consequence since a functional rifle is the result in either event. Common sense permits no other conclusion.

The government relies in part on *United States v. Lauchli*, 371 F.2d 303 (7th Cir. 1966), and also on *United States v. Kokin*, 365 F.2d 595 (3d Cir.) (per curiam), *cert. denied*, 385 U.S. 987 (1966), to support its view that the Commissioner's formal ruling in construing section 5845(c) to reach "sufficient parts to assemble an operative firearm" is dispositive of this case. In *Lauchli* we were concerned with the sale of machine gun parts under the earlier 1934 Act. Some of the machine guns were assembled at the time of sale, some were not. We took note of the Commissioner's

ruling, but found it unnecessary to apply the ruling to the particular facts of that case because the purchaser had demanded operable machine guns and some were assembled at random to demonstrate that all the guns were or would be operable. Whether those machine guns had previously been assembled was not an issue because the statute did not yet contain the "readily restored" clause. We held that the transaction involving all the machine guns was within the 1934 Act.

In *Lauchli*, 371 F.2d at 313, we relied on *Kokin*, a case involving a factual situation similar to *Lauchli*. *Kokin* held that the transfer of firearm parts constituted a violation of the 1934 Act because assembly was contemplated by the buyer. The seller assisted in the assembly of some of the firearms.

The government cited other cases indicating that the Act covers firearms even though they are not fully assembled. For example, in *United States v. Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978), the Fifth Circuit held that a short-barrel shotgun as defined in 26 U.S.C. § 5845(d), which was in two parts, was within the Act. Section 5845(d) contains the same "readily restored" phraseology. The court did not require proof of previous assembly, but the facts did suggest that one shotgun had been previously assembled. Thus, *Woods* did not reach the exact issue we are concerned with here.

In *United States v. Catanzaro*, 368 F. Supp. 450, 452-53 & n.3 (D. Conn. 1973), the court held that a shotgun with broken or missing parts was within the Act because new parts were readily available from the factory. The shotgun at issue was made up of both old and new parts. New or old was immaterial, however, because a functional shotgun could be readily assembled or reassembled (depending on how one views the addition of new parts). While these cases do not reach the exact issue before us, they illustrate the general unwillingness of courts to interpret the Act in an unduly restrictive manner.

In *United States v. Endicott*, 803 F.2d 506, 509 (9th Cir. 1986), and *United States v. Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984), the courts of appeals interpreted 26 U.S.C. § 5845(a) to include not only an assembled silencer, but also a silencer's unassembled component parts. Section 5845(a) does not contain either "combination of parts" or "readily restored" language.[6] Nonetheless, the courts employed a common sense approach to find that the statute covered unassembled silencers.

This court has also adopted a common sense approach to interpreting the National Firearms Act. In *United States v. Shafer*, 445 F.2d 579 (7th Cir.), *cert. denied*, 404 U.S. 986 (1971), we held that under 26 U.S.C. § 5845(f), grenade shells, fuses, and powder were to be considered a firearm even though disassembled because the statute did not expressly apply only to assembled firearms. To construe the Act otherwise, we held, would destroy the flexibility of the applicable provision and sanction evasion of congressional intent.

Section 5845(c), dealing with rifles, also allows some flexibility because it covers weapons designed or redesigned, made or remade, and intended to be fired from the shoulder. The additional language "and shall include a weapon which may be readily restored" should not be read so as to change the statute and the Commissioner's ruling to mean either that the rifle must be fully assembled, or if not, must have been previously assembled and could be reassembled. A rifle that has been disassembled for some reason is clearly in the same category as an identical collection of rifle parts that has not yet been assembled. The statute covers both. The added clause should not be read to change the meaning of the statute as written and interpreted.

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[6] The defendants point out that Congress subsequently enacted a statutory definition of a silencer that includes a "combination of parts" clause. *See* 18 U.S.C. § 921(a)(24) (Supp. IV 1986). Congress, however, did not amend 26 U.S.C. § 5845(a), the statutory provision at issue in *Endicott* and *Luce*.

Congress, in adopting the 1968 reenactments of the statutory definitions found in the 1954 Act, intended to adopt "the administrative construction of existing law."[7] That would include the Commissioner's ruling clarifying the statutory language. Congress gave no indication that it adopted the "readily restored" clause to add some unexplained exception to the prior administrative construction. In *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978), the Supreme Court held that when Congress, in reenacting a statute, voices its approval of an administrative or other interpretation, that interpretation is treated as if Congress expressly adopted it. Therefore, the interpretation continues to be binding on the courts.

In adding the "readily restored" clause, Congress specifically intended to overcome *United States v. Thompson*, 202 F. Supp. 503 (N.D. Cal. 1962), holding that a firearm with a missing firing pin was not a firearm under the Act.[8] In reacting to *Thompson*, Congress did not intend to greatly narrow existing coverage; the amendment was added to make clear that the Act's coverage is broad. The particular parts kits at issue here, even if containing all new and previously unassembled parts, were identical to parts that had been incorporated into many other functional rifles ready to fire. The defendants do not claim that the kits contained experimental parts not previously tested in prototype models. The parts in these kits are indistinguishable from parts in another kit or from parts fully assembled into a complete rifle. There is no sound reason for conjuring up a nonsensical statutory distinction unsupported by a reasonable interpretation of the statute and its legislative history. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). We find absolutely no justification to read the statute as restrictively as the district court did, taking it beyond the bounds of reason and common sense.

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[7] S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968).

[8] *Id.*

The defendants also endeavor to extract a favorable meaning from the statute apart from the "readily restored" language. To be a rifle an object must first be a "weapon," and a mere collection of parts cannot be a weapon. The weapon also has to be "made" as defined in section 5845(i). The defendants would read this definition restrictively to exclude a complete or unassembled parts kit. We read the statute as encompassing a complete parts kit ready to be assembled, at least by giving meaning to the language "otherwise producing a firearm." Thus, we find no merit in the defendants' argument.

The defendants also claim that, in any event, they were not selling short-barrel rifles since each kit included a flash suppressor that, if attached to the barrel, would extend the barrel beyond the regulated length. A flash suppressor, which has limited legitimate use apart from the military or police, is not an essential part of a rifle. A rifle fires accurately without it. A flash suppressor is an optional attachment that can be screwed to the end of the barrel. It is no more a part of the barrel than the rifle stock attached to the opposite end of the barrel. Federal regulations outline how to measure a barrel from its muzzle, which would exclude any removable attachment on the end of the muzzle. *See* 27 C.F.R. § 179.11 (1987). If a flash suppressor is permanently affixed to a barrel it may be counted in measuring barrel length, Rev. Rul. 55-570, 1955-2 C.B. 481, but that is not the present case. Thus, the flash suppressors here did not add to the barrel length of the rifles.

The defendants also argue that where Congress intended a firearms statute to encompass a parts kit, it used the words "combination of parts" as it did for the definitions of machine guns, 26 U.S.C. § 5845(b); mufflers and silencers, 18 U.S.C. § 921(a)(24); and "destructive devices," 26 U.S.C. § 5845(f). Pointing out the absence of such language in the definition of a rifle, the defendants would have us draw the conclusion that for some inexplicable reason Congress intended to distinguish short-barrel rifles. The present case is not concerned with miscellaneous parts for

machine guns and destructive devices. Parts for those weapons, which are regulated without limitation, are therefore parts with only one purpose, so that a single part could reasonably be subject to regulation. Parts for rifles, on the other hand, encompass many parts for many unregulated rifles. Therefore, a clause encompassing any combination of parts for a rifle would be inappropriate because it would include parts for unregulated rifles. We are concerned only with complete parts kits for short-barrel rifles. The defendants' comparisons of statutory sections are to no avail.

The defendants also claim that the statutory framework is too vague as applied to parts kits. The statute easily could be clearer, but a common sense reading of the statute, combined with the Commissioner's ruling, provides sufficient clarity. The government relies on *United States v. Freed*, 401 U.S. 601, 609-10 (1971) (quoting *United States v. Balint*, 258 U.S. 250, 253-54 (1922)). *Freed* involved the possession of unregistered hand grenades. Because of the dangerous nature of such devices, the Court shifted the burden to the person dealing in the items to ascertain at his peril whether his activities were within the statute. The defendants in the present case surely knew that they were in a highly regulated business and therefore bore some of the responsibility for ascertaining whether parts kits are regulated. *See United States v. Biswell*, 406 U.S. 311, 315-16 (1972).[9] It is sound advice for those in such

[9] We share Judge Manion's concern, expressed in his dissent, that defendants should receive fair notice that their conduct is illegal. Nevertheless, we believe that the defendants here could easily have ascertained the illegality of their conduct, if not already known to them, by making an inquiry into the applicable firearms regulations. In addition, the fact that the defendants were dealing in a highly regulated field, *see United States v. Biswell*, 406 U.S. 311, 315-16 (1972), reduces the fair notice concern. *See Freed*, 401 U.S. at 609-10; *see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("[B]usinesses . . . can be expected to consult relevant legislation in ad-

(Footnote continued on following page)

a regulated business to make a fair and reasonable determination about the status of their activities, not merely a self-serving and hopeful one.

The defendants rely on the principle that ambiguous criminal statutes should be construed in favor of leniency. *United States v. Bass*, 404 U.S. 336, 347-49 (1971). Nevertheless, we recently held that the principle of lenient construction does not require a court to ignore the obvious intention of the legislature in enacting the statute. *United States v. Kenngott*, No. 86-2246, slip op. at 14-15 (7th Cir. Dec. 30, 1987). As noted in *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984), "[t]he National Firearms Act was designed to regulate the manufacture, possession, and transfer of 'modern and lethal weapons . . . [that] could be used readily and efficiently by criminals or gangsters'." *Id.* at 49 (quoting H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 4025, 4542). The interpretation we apply is the only interpretation consistent with that congressional purpose. Thus, the defendants were not deprived of fair warning that their transactions in short-barrel rifles would violate the Act.

The defendants have been ably represented, but we find no merit in the particular arguments we have addressed or the related or other arguments that the defendants advanced.

Reversed and remanded for such additional proceedings as may be appropriate. No costs shall be assessed in this court.

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[9] *continued*

vance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry . . . .") (footnote omitted); W. LaFave & A. Scott, Criminal Law 92-93 (2d ed. 1986) (where defendant engages in regulated trade, requirements for fair warning are less stringent).

MANION, *Circuit Judge*, dissenting. I agree with the district court that § 5845 did not give the defendants fair notice that their conduct was illegal. Therefore, I respectfully dissent. Since the district court has thoroughly analyzed the issue in a published opinion, *United States v. Drasen*, 665 F.Supp. 598, 599-604, 607-14 (N.D. Ill. 1987), I will add only a brief comment.

I have no quarrel with the majority's observation that a person dealing in a highly regulated activity such as selling firearms must ascertain whether his activities are, in fact, regulated. Op. at 13-14. But that observation begs the question. I am willing to assume that the defendants made no attempt to determine whether selling the parts kits was illegal; the question we face, though, is whether, if the defendants had inquired, the statute would have fairly informed them that selling the parts kits was illegal.

The government is attempting to prosecute the defendants for selling a "combination of parts." However, where Congress intended to regulate combinations of parts, it did so precisely and explicitly. For example, the definition of "machinegun," § 5845(b), includes "combination of parts" language. Contrary to the government's assertion (which the majority appears to have accepted, op. at 12-13), the "combination of parts" language does not simply refer to "any" part. The definition of "machinegun" also includes "*any part* designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun. . . ." If the "combination of parts" language was sufficient to regulate "any" part, the "any part" language would have been unnecessary. The definition of "machinegun" shows that when Congress wanted to regulate combinations of parts, or "any" parts, it knew how to do so with precision. Congress has not included such precise language in the definition of rifle.

Furthermore, I would not rely on Rev. Rul. 54-606 (issued in 1954) to clarify the definition of rifle and impose criminal liability on the defendants. Revenue rulings do

not have the force of law; they represent only the IRS' opinion of the law. *See Flanagan v. United States*, 810 F.2d 930, 934 (10th Cir. 1987). More importantly, it is not even clear from the legislative history of the 1968 Gun Control Act that Congress intended to adopt Rev. Rul. 54-606. Although Congress stated that it intended to adopt "the administrative construction of existing law," Congress did not mention the revenue ruling. Nor did Congress even mention its understanding of the administrative construction it said it was adopting. Thus, *United States v. Board of Commissioners*, 435 U.S. 110, 134 (1978), cited by the majority, op. at 11, is inapposite: in that case, the legislative history of the re-enactments in which Congress adopted an administrative construction contained ample evidence that Congress knew exactly what the administrative construction was that it was adopting. *See* 435 U.S. at 132-35. Besides, *United States v. Board of Commissioners* was not a criminal case involving fair notice.

Perhaps the majority's construction of § 5845 is the "common sense" interpretation of that section; perhaps the majority's construction is what Congress actually intended. But Congress did not express that intent clearly enough to provide fair notice to these defendants that their acts violated the law. As the majority admits, "to clarify the statute little additional language would have been needed to accomplish what the government claims Congress intended. The statute could have defined a rifle as also including the parts thereof that could be readily assembled to form a functioning weapon." Op. at 4. But Congress did not include such language. We should not impose criminal liability based on imprecise statutory language, or on an old and obscure revenue ruling that Congress did not even mention in legislative history. Fair notice means that people should not have to speculate on how Congress (or a court) applies "common sense" when determining whether conduct is illegal. The district court correctly dismissed the six counts of the 13-count indictment dealing with the sales of the short-barrel rifle parts kits.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 87-1964 vs.

GERALD DRASEN, ANTHONY ALEO,
and CYNTHIA ALEO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 500—Judge Susan Getzendanner.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the cause is REMANDED, in accordance with the opinion of this Court filed this date. No costs shall be assessed in this Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 5, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 87-1964

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

GERALD DRASEN, ANTHONY ALEO,
and CYNTHIA ALEO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 500—Susan Getzendanner, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees on May 13, 1988, and the

brief of amici curiae in support thereof filed on May 27, 1988, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

[DATED MAY 20, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 CR 500

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD DRASEN, ANTHONY ALEO,
and CYNTHIA ALEO,

Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

Before this court is the government's motion to reconsider this court's Memorandum Opinion and Order of January 15, 1987, in which the court dismissed Counts I and III-VII of a thirteen count indictment brought against defendants Gerald Drasen, Anthony Aleo, and Cynthia Aleo. The defendants are charged with unlawfully dealing in short-barrel rifles, aiding and abetting in the transfer of short-barrel rifles, and possessing various machinegun receivers, in violation of 26 U.S.C. §5861. Counts I and III-VII of the indictment all charge the defendants with the sale of unregistered short-barrel rifles, not because they sold assembled short-barrel rifles, but because

they sold constituent parts from which a short-barrel rifle could easily be (but never had been) assembled. The court agreed with the defendants' contention that the sale of such constituent rifle parts does not constitute the sale of a "rifle" within the meaning of 26 U.S.C. §5845(c). Consequently, the court dismissed those counts. The government now moves for a reconsideration of that decision.[1]

The government in its motion has expressly confined itself to three points suggested by this court's earlier opinion. First, the government argues that this court's focus on the portion of the "rifle" definition containing the words "readily restored to fire" overlooked the government's separate contention that the constituent parts of a rifle should be considered tantamount to the rifle itself, without reliance on the "readily restored to" clause of §5845(c). Second, the government maintains that the court's holding on the "fair notice" issue appears to be inconsistent with the law governing strict liability offenses such as those charged here. Third, the "policy ' implications of the court's holding seem to be at odds with the intent of Congress in enacting the firearms law.

As to the first point, the government argues that the January 15 opinion proceeded on the premise that the only portion of the statutory definition of a "rifle" which could arguably reach the constituent parts of a short-barrel rifle was the "readily restored to fire" language, which was added to the statute in 1968. After extensively discussing the issue, the court held that the "readily *restored* to fire" clause meant that the firearms statute prohibited the sale only of unassembled rifle parts that had once been fully assembled, and not unassembled rifle parts that had never been assembled. Only the former could be read-

[1] Actually, the government has moved this court to reconsider its decision to "dismiss counts one through seven of the indictment." Gov. Br. of 2-4-87 at 10. The court did *not* dismiss Count II of the indictment. See Mem. Op. and Order, Jan. 15, 1987 at 20-22. The court assumes that the government is only asking for a reconsideration of the dismissal of Counts I and III-VII.

ily "restored to fire." The court did not, however, expressly discuss the government's separate contention that the constituent parts of a short-barrel rifle should themselves be considered a "rifle," entirely apart from the question of whether they can be considered "readily restored to fire." This contention was not discussed because the government placed virtually all emphasis on the "readily restored to fire" clause. However, the court now considers this contention outright and rejects it.

Under 26 U.S.C. §5845(c):

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

The government argues that unassembled and never-before-assembled parts of a rifle constitute "a weapon designed, . . . made, . . . and intended to be fired from the shoulder and designed . . . and made . . . to use the energy of the explosive in a fixed cartridge to fire only a single projectile . . . ." The court does not agree that unassembled and never-before-assembled rifle parts constitute a "rifle" within the meaning of the statute. Specifically, the court has great difficulty seeing how the never-assembled constituent parts of a rifle are themselves a weapon "made" to fire.

The government's support for its contention is based first on the Internal Revenue Service's Revenue Ruling 54-606, 1954-2 C.B. 33. This ruling, issued under pre-1968 law, stated that "the transfer of sufficient parts to assemble an operative firearm constitutes a transfer of a firearm subject to the transfer tax." In the January 15 opinion, the court stated that this revenue ruling provided insufficient authority to establish the conclusion that the transfer of the constituent parts of a never-before-assembled rifle

was subject to the transfer tax because the ruling did not address the relevance of the previous history of the currently unassembled rifle parts. It only addressed the present, unassembled status of the rifle parts and states that if they can be assembled into a rifle, the parts are a rifle. However, the significance of the previous history of those parts—whether they must have been once-fully-assembled to come within the reach of the statute—is the precise issue before this court and was not expressly addressed in that ruling.

The government resists this conclusion by suggesting that if the Commissioner had really intended to limit the meaning of the ruling to only once-assembled rifles, he would have used more precise language. This argument has some plausibility, but it is defeated by the government's own proof of legislative history. The government has established, as the court discussed in the January opinion, that when the Gun Control Act of 1968 added the "readily restored to fire" language to the rifle definition, it was Congress's intention to ensure that the language of the amended statute was "consistent with the administrative construction of existing law." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 46 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968). Thus, in Congress' (and the government's) view, the "readily restored to fire" clause merely reenacted the administrative revenue ruling. This means that Congress interpreted the revenue ruling as applying only to those rifle parts which could be "restored" to assembled condition. Congress therefore did not regard that ruling as applying to rifle parts which had never before been assembled since such rifle parts could not be "restored" to anything. The court thus rejects the government's contention that revenue ruling provides authority for its theory that never-before-assembled rifle parts are tantamount to a rifle. The enactment of the "readily restored to fire" clause in 1968, and the legislative history establishing that this clause merely restates existing administrative law, strongly suggest that the revenue ruling only covers rifle parts that had at some point been previously assembled into a complete rifle.

Next, the government proffers several cases which it argues support the conclusion that rifle parts—regardless of their prior history—are tantamount to a rifle. First, the government relies on *United States v. Zeidman*, 444 F.2d 1051 (7th Cir. 1971), a case discussed in the January 15 opinion. In *Zeidman*, the court affirmed a conviction under §5681 for possession of a rifle over the defendant's contention that the police search which uncovered his possession of the rifle was invalid. The police inadvertently discovered the rifle in two parts while conducting a valid search for something else. Zeidman argued that, because the rifle was in two parts, it was not a "firearm" within the meaning of the law and therefore there were no grounds for justifying the seizure. The court rejected Zeidman's argument because the interrelationship between the two parts was "apparent." *Id.* at 1053.

Zeidman does not support the government's position here. That case merely established that the inadvertent discovery of an unassembled short-barreled rifle provides the necessary probable cause for a seizure. It did not establish—because the issue was not relevant—that those unassembled parts need not ever have been fully assembled in order to sustain the legal sufficiency of a conviction for possessing a rifle. If anything, the court's opinion actually suggests that the seized rifle may have once been fully assembled. *See id.* at 1052 ("Zeidman told [an undercover investigator] that he had a *fully operable* . . . 9 millimeter Browning high powered pistol with a detachable shoulder stock." (emphasis added)). Thus, this court does not view *Zeidman* as establishing the legal proposition the government urges.

Nor is the government's citation to *United States v. Lauchli*, 371 F.2d 303 (7th Cir. 1966) persuasive. That case affirmed a conviction for dealing in "machineguns." At the time of his case, the "machinegun" definition was similar to the current definition of "rifle." 26 U.S.C. §5848(2) defined a machinegun as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot. . . ." The Seventh Circuit affirmed

Lauchli's conviction for selling 102 unassembled machineguns. This case, like *Zeidman*, however, does not support the government's conclusion that the sale of never-before-assembled rifle parts is tantamount to the sale of a complete rifle.

In affirming the conviction, the Court first discussed Revenue Ruling 54-606, the same ruling the government proffers in this case. The Seventh Circuit regarded that ruling as a "recognition" that "disassembly of complete weapons" was within the purview of the firearms statute. *Id.* at 312. The Court's use of the word "disassembly" suggests that it viewed the ruling as reaching firearms which had at one time been assembled (otherwise, they could never become *dis*assembled). The government in that case also argued that it would be too easy to violate the Act "if disassembly of complete weapons removes them from the purview of the Act." *Id.* Furthermore, the Court then stated that it "need not go so far as" the revenue ruling to hold Lauchli's conduct illegal. *Id.* Apparently, the Court felt that because the defendant knew the buyer planned to assemble the firearms, because the defendant had actually assisted in the assembly of some of the firearms, and because the buyers "demanded operable machineguns," the machinegun parts in that case were deemed "machineguns" within the meaning of the Act, even without considering the effect of the revenue ruling. *Id.* at 312-13.

The Court's reasoning in *Lauchli* does not help the government here. First, in *Lauchli* the defendant indicated his expectation that the machinegun parts would be assembled into complete machineguns and that the buyers demanded operable guns. It was because of this that the Court felt that defendant actually sold "machineguns," and it could reach this conclusion without "going so far as" the revenue ruling. In this case, there is no allegation in the indictment or Bill of Particulars suggesting that the defendants or the buyers expected these parts to be combined into complete weapons. More importantly, though, the Court viewed the revenue ruling (albeit in dicta) as

only reaching disassembled firearm parts, thus implying that the ruling reaches only previously assembled firearms. Thus, in the Seventh Circuit's view, the revenue ruling does not help the government's position in this case, and neither does the Court's actual holding in *Lauchli* since here, unlike that case, there is no allegation that the defendants sold the rifle parts with an expectation that they would be assembled later, or that the buyers had "demanded" operable rifles.

This court's reading of *Lauchli* is confirmed by the Seventh Circuit's remarks in another case the government cites, *United States v. Safer*, 445 F.2d 579 (7th Cir. 1971). There, the Court dealt with the possession of unassembled "destructive vehicles." Citing to *Lauchli* itself, the Court held: "We agree with the government that the grenade shells, fuses, and powder here may be considered such a firearm, even though disassembled." *Id.* at 583. Again, the Court's use of the word "disassembled" suggests that the constituent parts of a firearm must have once been assembled to be within the purview of the Act.

The Seventh Circuit's use of the word "disassembled" (as opposed to "unassembled") in *Lauchli* and *Safer* should not, I think, be regarded as accidental. As just discussed, the Court in *Lauchli* was comfortable with affirming the defendant's conviction because of the strong evidence establishing that he had intended to sell, and the purchasers had intended to buy, machinegun parts that could be assembled into complete weapons. Thus, a defendant's intent that the constituent parts become a complete weapon is necessary for a machinegun conviction based on the sale of machinegun parts. Presumably, such "intent" could also be established by evidence that the defendant had sold weapon parts that were once fully assembled. The previous, assembled status of those parts could reasonably permit the conclusion that the seller of the now-disassembled parts intended those parts to eventually become a complete weapon. Thus, the Seventh Circuit's choice of the word "disassembled" parallels its emphasis on the evidence of Lauchli's "intent to assemble." Accordingly, the

choice of the word "disassembled" should not be regarded as an accident.[2]

The government brings to the court's attention two cases from other circuits, *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984), and *United States v. Endicott*, 803 F.2d 506 (9th Cir. 1986), in which it was held that, although there is no "combination of parts" or "readily restored to" language in the "silencer" definition, an "unassembled" silencer is a "firearm" within the statute. The government reads these cases as implying that the unassembled parts of a rifle constitute a "rifle" within the meaning of the Act. These decisions do not expressly discuss the prior history of the currently unassembled firearm parts involved in those cases. Without an explicit discussion of whether those parts had previously been assembled, or some holding that the prior history is irrelevant, these cases cannot stand for the proposition that never-before-assembled rifle parts are nevertheless rifles. That proposition, which is the issue here, simply was not raised in those cases.

Furthermore, it does not necessarily follow that just because the unassembled parts of a rifle may be tantamount to a "rifle" the never-before-assembled parts of a rifle also constitute a "rifle" within the meaning of the statute. A "rifle" is something "made, designed, and intended" to fire. It is understandable that a court could view something that happens to be currently unassembled *but was once* assembled as something "made, designed, and intended" to fire while *not* simultaneously regarding a never-before-assembled set of rifle parts as something "made, designed, and intended" to fire. In this court's view, it would be unduly stretching the coverage of the statute beyond its permissi-

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[2] Even if one were to regard that choice as accidental, one could not expect the defendants to have known that what the Seventh Circuit really meant in *Lauchli* and *Safer* was that unassembled and never-before-assembled rifle parts (and not just "disassembled" rifle parts) are "rifles" within the meaning of the statute. This relates to the issue of "fair notice" discussed later in this opinion.

ble meaning, especially in light of the maxim (with which the government agrees) that criminal statutes must be construed strictly, to ignore this distinction.

Finally, the government reargues its main contention from the first round of briefing on this question by stating that the constituent rifle parts in this case can be "restored to fire" even though they have never been previously assembled. The reason, the government explains, is that the rifle parts in this case must have been designed from a model or prototype of a rifle which itself must have at one time been fully assembled and proven operable. That prototype was then disassembled and used as a model for the parts that are subsequently produced. The government then concludes that even though the rifle parts in this case have never been assembled, they can still be "restored" to fire because the prototype of those parts was once fully assembled. However, there is no suggestion in the statute, administrative authority, legislative history or case law that the "readily restored to" clause vicariously applies to never-before-assembled rifle parts simply by virtue of some unidentified, previously assembled prototype rifle from which the rifle parts are derived. Therefore, the court rejects this argument.

Thus, the court concludes that the defendants here have been given no "fair notice" that their sales of never-before-assembled rifle parts were illegal. If anything, the revenue ruling, when considered along with the legislative history to the Gun Control Act of 1968, seems to support the defendants' view more than the government's. The same is true of *Lauchli* and *Safer*. True, the cases the government cites do not expressly discuss the previous history of the firearm parts involved, and this might be taken as a sign that the previous history is irrelevant. It could thus be argued that those cases impliedly suggest that it does not matter whether rifle parts were previously assembled or not; either way they are rifles. However, such a reading of those cases would contravene the notion of "fair notice" discussed in the January 15 opinion. If a principle is not argued by the parties and decided

by a court, or at least expressly stated in dictum, but instead is identified only as a possible, arguable reading of an opinion, then individuals have not been put on "fair notice" of a court's actual view. That is certainly the case here, where the cases the government cites simply do not discuss the relevance of the previous history of currently assembled firearm parts to the scope of the firearms statute, nor have the parties to those cases argued that relevance. Indeed, as the court has already stated, if anything, the revenue ruling and cases like *Lauchli* impliedly suggest that never-before-assembled rifle parts are not covered by the statute.

The government takes issue with the court's analysis of the requirement that criminal statutes must put a defendant on "fair notice" that his conduct is illegal. It appears that the government reads the January 15 opinion as requiring that the defendants in this case must receive actual notice of the illegality of their sales before prosecution is permitted. That is not this court's holding. Rather, "fair notice" simply requires that the criminal statutes be clear enough so that a person *could* determine that the conduct currently under prosecution is illegal, regardless of whether he actually did determine that.

The government also claims that this court overlooked the case law on §5681 establishing that §5681 is a "strict liability" offense. Specifically, citing to *United States v. Freed*, 401 U.S. 601 (1971), the government correctly but irrelevantly argues that the statute does not require proof that the accused knew that the firearm at issue was federally regulated. Again, no one in this case argues that such proof was necessary. Rather the defendants only argue that the statute must be clear enough to provide individuals with a fair opportunity to determine the criminality of their actions. *Freed* also stands for the proposition that "every person dealing in [firearms must] ascertain at his peril whether that which he sells comes within the inhibition of the statute." *Id.* at 609. The court also agrees with this, and there is no dispute in this case that defendants here, dealing as they did in rifle parts, were

absolutely required to ascertain at their peril whether their dealings were prohibited by statute. The relevant question is whether the statute was clear enough to give the defendants a fair opportunity to ascertain the criminality of their conduct. It is this court's judgment that the firearms statute was not sufficiently clear to inform the defendants, had they attempted to ascertain the meaning of the statute, that the statute actually prohibited the sale of unassembled, and never-before-assembled rifle parts. That due process requires criminal statutes to give people a fair opportunity to determine what constitutes a criminal act is of course beyond peradventure. *See United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Hariss*, 347 U.S. 612, 617-18 (1954). However, in this case, not only is the statute itself unclear as to whether it covers the conduct the government wishes to prosecute, but the implementing revenue ruling and the interpretative cases do not shed any further light (at least not with any fair degree of precision) on this question. This is not fair notice.

Finally, the government cites cases, such as *United States v. Ross*, 458 F.2d 1144 (5th Cir.), *cert. denied*, 409 U.S. 868 (1972), and its progeny, as establishing that the definition of "destructive device," "silencer," and other types of firearms in §5845 is not so vague as to be unconstitutional. None of those cases is pertinent here. Each of those cases merely holds that for the particular conduct charged therein, the applicable statutory provision was specific and clear enough to put the defendant on constitutionally adequate notice that his conduct was illegal. This case is different precisely because a person of common intelligence could not deduce that the conduct charged here was within the prohibition of the statute. That there are other cases charging defendants with different types of conduct for which fair notice was provided is not proof that in this case, where a different sort of conduct is alleged, the statute provided defendants with fair notice that their conduct was illegal.

The government concludes its request for reconsideration by raising "policy" arguments for the result it is urging. First, the government insists that if this court's January 15 decision is allowed to stand, there will be a loophole in federal firearms regulation inconsistent with Congress's intent, since the ruling will permit gun traffickers to evade federal regulation by simply dealing in rifle parts which have never before been assembled. But the statute, as expressly written, already permits trading in "non-registered," long-barrel rifles. Thus, it is clear that a person can now evade the federal regulations relating to the *sale* of short-barrel rifles (the conduct charged here) by simply selling long-barrel rifles to buyers who can then easily alter those rifles into short-barrel rifles by way of a hacksaw. The specter the government raises of unprecedented circumvention of an otherwise carefully drafted scheme regulating the sale of short-barrel rifles is therefore unrealistic given that the statute already permits possibilities for circumvention.

There is a further reason for why it is difficult to be impressed with the government's fears that dismissing these Counts will frustrate congressional intent. The law under which the government is prosecuting the defendants is not a provision of the federal Criminal Code. It is part of the Internal Revenue Code. If this prosecution were based on the Criminal Code, then it would be plausible to credit Congress with an intent to prohibit a broad range of gun-trafficking activities. But the law involved here is part of a revenue-producing code. As such, I am unwilling to defer to suggestion that this law is part of an overall scheme to reduce armed violence in this country. Instead, I insist that there be "fair clarity" in a statute which, though criminal, is part of an overall scheme to raise money for the government and only incidentally pertains to gun dealing.

The *Lauchli* case actually provides me with reason to believe that Congress did not intend §5845 to apply to the constituent "parts" of a rifle, whether unassembled or disassembled. In a portion of the *Lauchli* decision

which the government does not discuss, the Court assessed the validity of defendant's conviction under 15 U.S.C. §901. This law, now repealed, was part of the Federal Firearms Act of 1938. Section 901 of that Act defined firearms as including "any part or parts" of any weapon designed to expel projectiles by the action of an explosive. See discussion at *Lauchli*, 371 F.2d at 313. Because of the "part or parts" language, the Seventh Circuit affirmed the conviction of the defendant based on his shipment of machinegun and rifle parts. *Id.* at 313-14. "[T]he District Court properly held [that such shipments] were within the broad reach of the Act as 'parts' of a weapon." *Id.* at 314.

Section 5845(c) (the "rifle" law relevant here) contains no "part or parts" language. It does not have the "broad reach" that the now-repealed 1938 Act had. But, as the 1938 Act's language reveals, when Congress wanted to cover constituent parts of a firearm, it knew how to say so. That Congress has not said so here is further evidence that §5845(c) is not intended to cover the constituent parts of rifles, as least insofar as they have never been previously assembled.

The government's second "policy" argument is that this court's ruling places on the government an intolerable burden of proof. In order to prosecute a person who sells the constituent parts of a rifle, the government must now prove that those parts were at one time previously assembled into a complete rifle. This, the government maintains, will make prosecutions virtually impossible.

This is completely unsubstantiated. It is an assertion by government counsel without any evidentiary basis. More importantly, a court should not judicially rewrite a statute to alleviate some of the burdens of proof Congress has apparently chosen to place on the government.

If there is a "policy" argument relevant to this case, it is in favor of dismissing these Counts. The government's attempt to prosecute the defendants for the sale of unassembled and never-before-assembled rifle parts

would seem to expand the reach of §5845 to include a whole spectrum of activity which Congress plainly did not intent to regulate. For example, it is perfectly legal (as the government agrees) for a person to deal in long-barrel rifles. It is therefore also perfectly legal for a person to deal in long-barrel rifle parts. But a person who deals in such parts, and also happens to possess independently a single short-barrel part (which is being used for some unrelated, innocent purpose) could be prosecuted under the government's view of §5845. Since this dealer would be in possession of parts which could be combined into a short-barrel rifle, he would be vulnerable to a §5845 prosecution. Contrary to *Lauchli*, it would not matter that the dealer never intended those parts to be assembled into a short-barrel rifle. It also would not matter that the dealer has never previously assembled those parts into a short-barrel rifle (from which an "intent" to assemble could otherwise be reasonably inferred). Thus, the government's view of §5845 would seem to contravene Congress' own intent in limiting its regulation of gun dealing.

In summary, the court reaffirms its conclusion that the firearms statute did not provide the defendants with a fair opportunity for discovering that the sale of never-before-assembled rifle parts comes within the purview of the statute. No court has ever held that such rifle parts are within the purview of the statute. The statute itself does not expressly provide this. The sole, relevant revenue ruling on this subject does not state this, and given the "readily restored to" language of the Gun Control Act of 1968 merely "restated" the effect of that ruling, it is likely that the ruling was only meant to cover only previously assembled rifle parts. Indeed, this seems to be the implication of the Seventh Circuit in *Lauchli* and *Safer*. True, *Luce* and *Endicott* hold that unassembled firearm parts are tantamount to a firearm within the meaning of the law. However, those two cases were not presented with the question whether those currently unassembled parts must once have been assembled to come within the reach of the statute. Nor does the reasoning of those cases

strongly suggest the result the government urges, especially in light of the doctrine that criminal statutes must be strictly construed. It is because the statute itself, the revenue ruling, and the Seventh Circuit cases have never spoken on this question and, if anything, they may even suggest that previous assembly *is* a requirement, that this court must once again conclude that the defendants in this case had no "fair notice" of the criminality of the conduct that the government now seeks to prosecute.

Conclusion

The government's motion to reconsider this court's January 15 opinion in which Counts I and III-VII of the indictment were dismissed is denied. In accordance with the government's request for thirty days in which to consider this opinion and determine whether or not to appeal, the case is set for status hearing on June 15, 1987, at 9:30 a.m. At that time the government should inform the court whether or not it will appeal the dismissal of these counts.

It is so ordered.

/s/ Susan Getzendanner
United States District Judge

DATED: MAY 20, 1987

[DATED JANUARY 15, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 CR 500

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD DRASEN, ANTHONY ALEO,
and CYNTHIA ALEO,

Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

The government has brought a thirteen count indictment[1] against defendants Gerald Drasen, Anthony Aleo, and Cynthia Aleo. Specifically, Gerald Drasen is charged

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[1] On January 9, 1987, the January, 1987 Grand Jury returned a superseding indictment in this case. In many respects it is identical to the original indictment, but there are some significant differences. Count XIV of the original indictment is not included in the superseding indictment. Counts III-VII, previously alleging only the sale of rifles through the sale of never-before-assembled constituent parts of a rifle, have been expanded to allege that such a "rifle" also "constituted a combination of parts from which a machinegun can be assembled." Count I, previously alleging only that Drasen was a dealer in rifles, now alleges that he was a dealer in rifles and machineguns. Nothing in this opinion addresses the legal sufficiency of these new allegations.

with unlawfully dealing in short-barrel rifles, aiding and abetting in the transfer of short-barrel rifles, and possessing various machinegun receivers, in violation of 26 U.S.C. §5861. The indictment further charges defendants Anthony Aleo and Cynthia Aleo with aiding and abetting in the dealing and transfer of short-barrel rifles, in violation of the same statute. The defendants, represented by joint counsel, have moved to dismiss the indictment. For the reasons stated below, the motion is denied in part and granted in part.

Motion to Dismiss

The indictment breaks down into four categories of counts and the defendants attack the legal sufficiency of each category. Accordingly, the court will address these attacks category by category.

Counts I and III-VII

These counts of the indictment all charge the defendants with the sale of unregistered short-barrel rifles, not by the sale of assembled short-barrel rifles, but by the sale of the constituent parts from which a short-barrel rifle could easily be assembled. The defendants' contention is that the sale of such constituent parts of a rifle does not constitute the sale of a "rifle" within the meaning of the statute.

Title II of the Gun Control Act of 1968, under whose provisions the defendants are charged here, requires registration of certain weapons which fall within the definition of "firearm." In particular, a "firearm" is, among other things, a "rifle having a barrel or barrels of less than 16 inches." 26 U.S.C. §5845(a). Possession of such a Title II firearm must be registered in the central registry maintained by the Secretary of Treasury pursuant to 26 U.S.C. §5841. Subsequent transfer of such a firearm must be in compliance with 26 U.S.C. §5812 which requires a written application to the Secretary of Treasury and the payment of a transfer tax. Title II also defines "rifle" as follows:

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, *and shall include any such weapon which may be readily restored to fire a fixed cartridge.*

26 U.S.C. §5845(c) (emphasis added). The crucial question in these counts pertains to the legal effect of the underscored portion of the definition of rifle. The defendants contend, and the government apparently agrees, that the rifle components which defendants allegedly sold, have never been combined to form complete rifles. Therefore, the issue here is whether unassembled, and never-before-assembled, parts of a rifle nevertheless constitute a "rifle" within the meaning of the statute.

The defendants launch several persuasive arguments suggesting that the component parts involved in this case do not fall within the statute's definition of "rifle." First, defendants argue that the plain meaning of the language "and shall include any such weapon which may be readily restored to fire a fixed cartridge" cannot include a group of parts which have never been assembled into a working firearm. According to defendants, one cannot "restore" to firing condition a group of parts which have never before been in firing condition. To further support their reading of the word "restore," defendants contrast the definition of "rifle" with that of "machinegun" in 26 U.S.C. §5845(b), another type of "firearm," *see id.* §5845(a). The statute defines "machinegun" to include not only any weapon which "can be readily restored to shoot" but also "any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

The defendants' second argument is that no case has applied the "readily restored to fire" language of the "rifle" definition to hold that a group of parts which might be assembled into a rifle, but never has been, is neverthe-

less a rifle. According to defendants, the cases dealing with "rifles," as well as "machineguns" and "shotguns" (another type of "firearm"), involve only weapons which had once been assembled and in firing condition, though the weapons were discovered disassembled.

Defendants' third argument concerns the legislative history of the statute. Defendants point out that in enacting the Gun Control Act of 1968, Congress expanded the definition of "machinegun" to include "any combination of parts from which a machinegun can be assembled." Congress supposedly considered, but rejected, a similar expansion of the statutory definition of "rifle" to include a "combination of parts" clause. *See Federal Firearms Act, Hearings Before the Subcommittee To Investigate Juvenile Delinquency, Judiciary Committee*, U.S. Senate, 90th Cong., 1st Sess. 1086-1087 (1967). Therefore, defendants conclude, this court should not interpret the definition of "rifle" to cover a "combination of parts" which could be made into a rifle.

The government's response to these arguments is basically twofold. First, the government contends that the meaning of the language "readily restored to fire" in the "rifle" definition can be determined from the legislative history, and the defendants have erroneously read that history. The government explains that the Gun Control Act of 1968 made two changes in the definition of "rifle," only one of which is relevant here. That change is the addition of the last clause of the definition, the clause stating that a "rifle" includes "any such weapon which may be readily restored to fire a fixed cartridge." The authors of this language stated that it was their intention in making this change to ensure that the language of the statute was "consistent with the administrative construction of existing law." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 46 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968). The government then cites a Revenue Ruling of the Commissioner of Internal Revenue. The ruling, although not specifically cited in the above legislative history, nevertheless constitutes part of the then "administrative con-

struction of existing law." It stated that "[t]he possession or control of sufficient parts to assemble an operative firearm . . . constitutes the possession of a firearm. . . . Further, the transfer . . . of sufficient parts to assemble an operative firearm is deemed to constitute the transfer of a firearm subject to the [transfer] tax." Rev.Rul. 54-606, 1954-2 C.B. 33. This administrative construction, which the Gun Control Act authors apparently intended to capture by the word "restore" does not require that the unassembled parts actually once have been assembled into an operational firearm. Instead, all that is required is that the possessor or tranferor have parts sufficient "to assemble" an operative firearm. The previous history of those "parts" is thus apparently irrelevant.

Accordingly, the legislative history provides some support for the government's broad reading of the word "restore." Nevertheless, it may seem somewhat odd that the definition of "machinegun" includes both the "readily restored" language and the "combination of parts" language, where the definition of "rifle" includes only the former. This difference must be explained.

The government explains this significance again by resorting to the legislative history. In amending the definition of "machinegun" in 1968, the authors of the legislation stated that the first sentence of section 5845(b) (the "readily restored to" language) was meant to restate the existing law. *See* H.R. Rep. No. 1577, 90th Cong., 2d Sess. 45 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 45 (1968). In further commenting on the "readily restored to" language in the context of the definition of "shotgun," where this same language also appears, the authors of the statute observed that it was intended to overrule a single district court decision that interpreted the pre-1968 firearms definition as not reaching a firearm (in that specific case, a "shotgun") that was missing only the easily replaceable firing pin. *See* H.R. Rep. No. 1577, 90th Cong., 2d Sess. 46 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 46 (1968) (commenting on *United States v. Thompson*, 202 F.Supp. 503 (C.D. Cal. 1962). Thus, the "readily restored

to" language was not meant to extend the definition of a "firearm" to unassembled parts of a "firearm." According to the previously discussed 1954 Revenue Ruling, the definition of "firearms" such as "rifles," "machineguns," and "shotguns" already included such unassembled weapons. Instead, "readily restored to" was meant to ensure that a weapon missing an easily replaceable part was also nevertheless within the reach of the statute.

The presence of "combination of parts" language, which is found in the "machinegun" definition, but not "rifle" definition, can now be explained. The second sentence of the "machinegun" definition contains the "combination of parts" language. It states that "the term [machinegun] shall also include the frame or receiver of any such weapon . . . and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." A possible interpretation of the "combination of parts" language is that it is meant to reach the subset of "machineguns" consisting of "frames" or "receivers." That is, the second sentence of this definition is meant to reach "any combination of parts" from which a "machinegun," i.e., a "frame or receiver" can be made. As the government explains, this interpretation is sensible given the differing physical characteristics of machineguns and rifles. The frame and receiver of a rifle are lawful because they can be used to assembled unregulated weapons, such as rifles having barrels of 16 inches or more (non-"sawed-off" rifles). However, the frame and receiver of a machinegun cannot be used in any unregulated weapon. Hence, Congress specifically sought to include language in the machinegun definition to cover frames, receivers, *and their combination of parts*. That may be why the "combination of parts" language appears in the "machinegun" definition and not in the "rifle" definition.

The government concludes its discussion on the legislative history by refuting the defendants' interpretation of the letter to the Senate Judiciary Committee. According to the defendants, this letter argued against a proposal

to include "combination of parts" language in the "rifle" definition. As the full text of the letter indicates, the proposal sought to include within the definition of "rifle," the frames and receivers of rifles, and presumably their respective combination of parts. Congress decided not to extend the definition of "rifle" to include rifle frames and receivers and their combination of parts, so the absence of the "combination of parts" language from the rifle definition, does no damage to the government's position. Indeed, the text of the letter indicates that the author of the letter (the General Counsel to the Department of Treasury) considered the Gun Control Bill "to represent the administrative construction of existing law and to clarify a situation resulting from conflicting judicial decisions concerning the status of firearms which are disassembled or which are complete and operable except for a readily restorable part or parts." *Federal Firearms Act, 1968: Hearings on S. 1854 Before the Subcomm. To Investigate Juvenile Delinquency*, 90th Cong., 1st Sess. 1087 (1967). This quotation is fully consistent with the government's position.

While the legislative history presented in this case suggests that a "rifle" includes the constituent parts of a rifle, even though those parts were never assembled, the court is also interested in whether any cases confirm this view. As the defendants correctly argue, there appear to be no reported cases squarely upholding the government's position. Indeed, it seems that most of the pertinent "rifle" cases involve rifle parts that, although discovered in unassembled form, were once assembled. In the remaining cases, the previous history of those parts is simply not explicitly addressed. However, just as there are no cases squarely upholding the government's position, none of the defendants' cases expressly hold that prior, assembled status of rifle parts is *necessary* before unassembled rifle parts will be deemed "rifle" under the "readily restored to fire" definition.

Some guidance, however, may be gained from the Seventh Circuit's opinion in *United States v. Zeidman*, 444 F.2d

1051 (7th Cir. 1971). In that case, the Court upheld the seizure of a short-barrel rifle that was found in two parts, that is, in two separate drawers of the same dresser. The Court reasoned that since the two parts could be easily combined to form a "rifle" within the meaning of the federal statute, the two parts themselves also constituted a "rifle," and as such, the "rifle" was required to be registered under 26 U.S.C. §5841. *See id.* at 1053. Significantly, the Court made no express finding as to whether the two parts, at any time prior to the seizure, had ever been assembled into a complete rifle. As the Court explained the facts, investigators were on the defendants' premises lawfully, pursuant to a warrant to seize a "machine pistol." Though they did not find the warrant-specified item, they found the two parts of another firearm, the rifle. The Court noted that "[n]o mention was made in the warrant of the Browning pistol and shoulder stock [the "rifle" parts], notwithstanding that Zeidman had allegedly shown these two items to investigator Conroy on January 11." 444 F.2d at 1053. The use of "two" in this passage suggests that the two rifle parts were not assembled when originally presented to the undercover investigator. The Court then upheld the seizure of the two rifle parts as an unlawfully possessed "rifle" because the parts were discovered in the course of a legitimate search and "[w]hen viewed together, the interrelationship of these two items is apparent, even without prior knowledge of their connection." *Id.* This second passage seems to indicate, somewhat inconsistently with the first cited passage, that the two parts may have once been connected. However, at the same time, the passage also suggests that the seizure of the interrelating parts was valid, even if the investigators did not know that the rifle parts had once been connected. In other words, the investigators were entitled to seize the rifle parts as an unlawful, unregistered "rifle," (at least for probable cause purposes), even if they had no knowledge of whether those parts had once been connected. Thus, to the extent that the rifle parts in *Zeidman* had in fact once been assembled, the Court seemed to intimate that this may not have been

relevant to their illegality. And to the extent that the rifle parts had never been assembled, or the Court failed to render an express opinion on the point, it may be reasonable to assume that the Court did not find such prior history to be relevant to whether the two parts constituted a "rifle."

This court has expressed the government's position as strongly as possible. Nevertheless, the court still has grave doubts about whether the statutory language "readily restored to" has put the defendants on sufficient notice to adequately inform them that their conduct in dealing with never assembled rifle parts was illegal. When the government's rhetoric is washed aside, its position essentially comes down to a single Revenue Ruling, indirectly referred to in the legislative history. That ruling does not even squarely support the government's position since it does not indicate one way or another whether rifle parts need to have been once-before assembled in order to be a "rifle." It only addresses the present, unassembled status of the rifle parts and states that if they can be assembled into a rifle, the parts are a rifle. Thus it fails to address the relevance of the previous history of those parts. However, that previous history is the precise issue this court faces in evaluating this indictment. Thus, the Revenue Ruling is a thin reed on which to hang federal prosecution.

Moreover, the *Zeidman* case is hardly convincing support for the government's position. It rendered no express opinion on the issue before the court now. The precise issue before the Court there was whether there was probable cause for a warrantless seizure of a rifle in two parts. The issue here is quite different—it is whether the indictment properly states the elements of a statutory crime. Furthermore, no other case cited by the government holds that the firearms statute covers rifle parts that have never been assembled.

In view of this weak support for the government's position, the court must dismiss Counts I and III-VII. Although there is some legislative support for the government's reading of "restore," it is simply not strong

enough to overcome the presumption against interpreting a word to mean something other than its standard English usage, and the presumption in favor of construing criminal statutes against the government. There is no doubt that when the government seeks to prosecute conduct it deems punishable, it must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *see also United States v. Petrillo*, 332 U.S. 1 (1947) (the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices). There is no doubt, as the Seventh Circuit has recently demonstrated, that courts should not contort the meaning of words beyond their common usage. *See United States v. DeCastris*, 798 F.2d 261 (7th Cir. 1986) (observing that the words "resume or assume employment" do not necessarily cover a person who continues employment in the same job during the relevant time period). These standards have been violated here. All persons of common intelligence understand "restore" to mean "return to a previous condition." People are not required to divine the government's secret modification of that definition, nor are they required to assume that legislative histories, court decisions, and revenue rulings resolve legal questions that are not directly presented in those histories, decisions, and rulings.

In sum, the government in this case has attempted to give "restore" an unusual meaning. People ordinarily do not think that rifle parts can be "restored" to a rifle if those parts never were previously assembled as a rifle. The legislative history is too indirect and scant to convey a "sufficiently definite warning" to individuals of the government's now-proffered definition. In these circumstances, the due process guarantee of "fair notice" of criminality would be violated if prosecution proceeded on these counts. *See United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Harris*, 347 U.S. 612, 617-18 (1954). Accordingly, these counts must be dismissed, as they appear in the original indictment.

Counts VIII and IX

These two counts charge defendant Drasen with possession of unregistered machinegun receivers, not by the possession of assembled receivers, but by possession of unassembled constituent parts of machine gun receivers. Drasen seeks to dismiss these counts on grounds similar though not identical to the grounds raised in the previously discussed counts. Specifically, Drasen does *not* argue that the federal statute covers only previously assembled machinegun receivers. Rather, he argues that while the federal statute covers "machineguns" and weapons which can be "readily restored to" machinegun status, and while it also includes machinegun "receivers," it does not include objects which can be "readily restored to" receiver status or the constituent "parts" of machinegun receivers. Thus, defendants argue that disassembled parts of a once-assembled receiver do not constitute a receiver. As to this argument, the court has little difficulty rejecting Drasen's reading of the statute.

The type of "machinegun" which must be registered under the federal statute is defined in that statute as follows:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. §5845(b). Thus, under the first sentence of the definition, a "machinegun" is any weapon which "shoots" or can be "readily restored to shoot." Under the second sentence, a "machinegun" is also a "frame or receiver" of any such weapon. Finally, also under the second sen-

tence, a "machinegun" is "any combination of parts from which a 'machinegun' can be assembled." As explained earlier, since "machinegun" includes "frames or receivers," the second sentence may properly be interpreted as stating that a "machinegun" is also "any combination of parts from which a 'frame or receiver' can be made." Thus, under the plain language of the statute, Drasen's possession of unregistered receiver *parts* comes within the reach of the statute (assuming that those parts can be "combined" to form a receiver).

Drasen resists this conclusion by pointing to the regulatory definition of "frame or receiver":

> That part of a firearm which provides housing for the hammer, bolt or breechlock and firing mechanism, and which is usually threaded at its forward end to receive the barrel.

27 C.F.R. §179.11. Drasen argues that since this definition speaks only of "that part" rather than "that part or parts," it is contrary to regulatory authority to extend the definition of receiver to include "parts" of a receiver. However, the controlling statute itself as just explained, reaches not only a complete frame or receiver, which is defined in the administrative regulation as one "part," but also "any combination of parts" from which a "machinegun," which by definition includes a "receiver," can be made. Thus, the regulation merely defines a complete receiver. However, since the controlling statute covers not only complete receivers but also "any combination of parts from which 'frames or receivers' can be assembled," the regulatory definition should not be interpreted to limit the coverage of the authorizing statute.

Finally, Drasen argues that the receiver parts in question in this case had been cut in half so as to require welding to become a complete "receiver." Thus, Drasen contends, more than a machanical operation is necessary to restore or assemble these parts into a complete receiver and they are hence not "readily restored" to receiver status. The court must reject this argument too.

First, it is not clear that the "readily restored to" language of the first sentence of the "machinegun" definition applies to the court's interpretation of the second sentence which defines a machinegun as including "any combination of parts from which 'frames or receivers' can be assembled." After all, as the court has interpreted that sentence, it does not on its face state "from which 'frames or receivers' can be readily assembled." However, the court will assume that such is the meaning of the statute. Even so, the question of whether the two halves of the receiver involved in this case can actually be readily assembled into a complete receiver is a question of fact which the court may not address on a motion to dismiss the indictment. Accordingly, as a legal matter, Counts VIII and IX are sufficient to withstand Drasen's motion to dismiss.

Counts X-XIII

In these counts of the indictment, as modified by the Bill of Particulars, Drasen is charged with possession of an unregistered "mini-gun" housing which the government claims is the "receiver" of this weapon. Drasen argues for dismissal of these counts on two grounds. First, he contends that the housing which he allegedly possessed is not a "receiver" within the meaning of the statute. Second, he argues that the "mini-gun" is not a "machinegun" within the meaning of the statute, and so regardless of whether the housing is a "receiver," registration of that housing is not required by law since only "firearm" receivers need to be registered.

As to the first argument, Drasen maintains that no statutory, regulatory, or decisional authority has ever determined that a "mini-gun" housing is a receiver. Contrary to this assertion, there is indeed regulatory authority holding that "housing" is a "receiver." As cited earlier in this opinion, the definition of a "receiver" is "[t]hat part of a firearm which provides *housing* for the hammer, bolt, breechlock and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."

27 C.F.R. §179.11 (emphasis added). Thus, the housing of a firearm constitutes the receiver of a firearm. The next question, then, is whether a "mini-gun" is a "firearm" within the meaning of the statute. As the government and Drasen have narrowed the issue, the question really is whether a "mini-gun" is a "machinegun."

According to Drasen, the "7.62mm Mini-gun" is not a typical automatic fire weapon. It is essentially a Gatling gun with six barrels each of which has its own firing chamber and firing mechanisms housed by a rotor which is rotated by an electric motor. As each barrel reaches a fixed point in its rotation, a round is fired from that barrel. The "mini-gun" is really six guns lashed together and driven by an electric motor to accomplish rapid fire.

The specific Revenue Ruling that the parties agree governs whether this device is a machinegun provides as follows:

> Pursuant to consideration and evaluation of available data respecting Gatling guns, the Internal Revenue Service has concluded that such guns fall within two classifications, as follows:
>
> 1. Any crank-operated gear-driven Gatling gun (produced under 1862 to 1893 patents) employing a cam action to perform the functions of repeatedly cocking and firing the weapon, as well as any such gun actuated by an electric motor in lieu of a hand-operated crank (produced under 1893 and later patents), while being a forerunner of fully automatic machineguns, is not designed to shoot automatically or semiautomatically more than one shot with a single function of trigger. Such weapons are held *not* to be firearms within the purview of the National Firearms Act (Chapter 53 of the Internal Revenue Code of 1954).
>
> 2. Any Gatling gun designed or redesigned to employ the hand crank only to sear off the first round of ammunition, thence becoming a gas-operated fully automatic machine gun (adapter patented in 1895) is

> held to be a firearm within the purview of the National Firearms Act, specifically, section 5848(2) [defining "machinegun"] of the Internal Revenue Code of 1954.

Rev. Rul. 55-529, 1955-2 C.B. 482 (emphasis original).

The indictment and the Bill of Particulars do not specify whether the mini-gun receiver Drasen possessed was designed for a mini-gun of the paragraph-one type or paragraph-two type. Drasen's generic description of a mini-gun suggests that all mini-gun receivers fall within paragraph one. However, the government insists that at trial it will adduce expert testimony rebutting Drasen's contention that his mini-gun receivers were intended only for the paragraph-one type. The government claims it will prove that Drasen's mini-gun receivers were designed for fully automatic firearms, the paragraph-two type. Thus, the court must reserve for trial the factual question of whether the mini-gun receivers identified in Counts X through XIV are intended only for weapons that can shoot only one shot per pull of the trigger, or whether they are intended also for weapons that can fire automatically. If only the former turns out to be the case, then under the Revenue Ruling the receivers would not be "firearm" or "machinegun" receivers within the purview of the statute. Since registration of such unregulated receivers is not required under the statute, those counts would then have to be dismissed. But at this stage in the proceedings, these counts of the indictment are legally sufficient to withstand the motion to dismiss.

Count II

As amended by the Gun Control Act of 1968, the National Firearms Act includes within the definition of "machinegun": "any combination of parts designed and intended for use in converting a weapon into a machinegun." 26 U.S.C. §5845(b). The defendants are charged in Count II with the unregistered sale of such a "conversion kit" in two installments, on July 17, 1985 and August 6, 1985.

In its Bill of Particulars, the government explains that its prosecution is based on the sale of the constituent parts of a conversion kit to a single purchaser on two separate days, and that such a sale constitutes the sale of a "machinegun."

Defendants argue that the piecemeal sale of the constituent parts of a conversion kit does not come within the reach of the federal statute. The court does not agree. Defendants' position assumes that it is impossible to sell a "combination of parts designed and intended for use in converting a weapon into a machinegun" unless that sale occurs on one occasion. However, if a portion of that combination is sold on one day, with the intention that the other portion will be sold to the same purchaser on another day, and in fact such other portion is later sold to that purchaser, then the seller has indeed sold a "combination of parts designed and intended for use in converting a weapon into a machinegun." Of course, if the defendants sold the first portion to a purchaser on one day *without* intending to sell that purchaser the second portion on another day, then the first portion, even if deemed a "combination of parts," would not be a "combination of parts designed and intended for use in converting a weapon into a machinegun." The lack of any intent to sell the second portion, which portion is necessary for the conversion kit to be complete and fully operable, would necessarily mean that the seller failed to sell a "combination of parts *designed and intended*" to convert a weapon into a machinegun.

In this case, the Bill of Particulars adequately alleges that the defendants intended that the sale of the first portion of the conversion kit would be followed by a later sale of the remaining portion: "With respect to count two, the government does contend that the sale of the constituent parts of a conversion kit to a single purchaser on two separate days, *if done knowingly*, does constitute the sale of a 'machinegun' within the meaning of the statute." (emphasis added). The court construes the government's use of the word "knowingly" to mean that it is accusing

the defendants of having the intention to sell a complete kit over the course of two separate days. If this intention is not proven at trial, this count will fail. But as a legal matter, the count alleges conduct that is prohibited by the statute. Count II therefore will not be dismissed.

Conclusion

The defendants' motion to dismiss the indictment is granted as to Counts I and III-VII, and denied as to all remaining counts. The court will address the motion to suppress and discovery motions by separate opinion.

/s/ SUSAN GETZENDANNER
United States District Judge

January 15, 1987

Supreme Court, U.S.
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No. 88-430

In the Supreme Court of the United States

OCTOBER TERM, 1988

GERALD DRASEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment on the ground that the federal firearms statute in question did not cover unassembled rifles that had never been assembled.

In 1986, petitioners were charged in six counts of an indictment returned in the United States District Court for the Northern District of Illinois. The indictment charged them with unlawfully dealing in and transferring short-barrel rifles, in violation of 26 U.S.C. 5861. On January 15, 1987, the district court dismissed those counts on the ground that the statute, 26 U.S.C. 5861, does not cover unassembled and never-before-assembled short barrel rifle parts. The court held that such parts are not included within the plain language of the statutory definition of "rifle" in 26 U.S.C. 5845(c), which includes any "weapon which may be readiiy restored to fire a fixed cartridge." The court also found that the statute did not give fair notice to petitioners that their conduct was illegal (Pet. App. 36-52, 21-35).

The court of appeals, in a split decision, reversed (Pet. App. 1-16). The court relied on a formal ruling of the Commissioner of Internal Revenue interpreting the statute, after it was adopted in 1954, to reach the possession of sufficient parts to assemble an operative firearm. Rev. Rul. 54-606, 1954-2 C.B. 33. The court concluded that Congress, in the 1968 reenactment of the statute, intended to adopt the administrative construction of existing law. The court recognized that while the added language "readily restored" in the reenactment is somewhat ambiguous, Congress gave no indication that it adopted this clause in order to add some unexplained exception to the prior administrative construction. Pet. App. 7-11. The court also held that a commonsense reading of the statute, combined with the Commissioner's ruling, provides sufficient fair warning in a highly regulated business. *Id.* at 13-14.

Petitioners contend (Pet. 5-16) that unassembled and never-before-assembled constituent parts of a rifle are not a short-barrel rifle within the meaning of 26 U.S.C. 5845, as defined in 26 U.S.C. 5845(c). Petitioners also contend (Pet. 16-20) that the construction of the statute by the court of appeals denied them their due process right to fair notice that their conduct was criminal. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their statutory and due process arguments to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against

them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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